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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 570

BIRMINGHAM FIRE INSURANCE COMPANY
OF PENNSYLVANIA,
Petitioner,

vs.

TROPICAL MARINE PRODUCTS, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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vs.

TROPICAL MARINE PRODUCTS, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Birmingham Fire Insurance Company of Pennsylvania, your Petitioner, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on August 13, 1957.

OPINIONS BELOW

The opinion of the District Court is reported at 1956 A.M.C. 567 and is found on Page 47 of the record printed for the use of the Court of Appeals. The opinion of the Court of Appeals has not been reported as of the time of the preparation of this petition but is printed in Appendix B to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on August 13, 1957 and a petition for rehearing was denied on September 11, 1957 (Appendix C). The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

1. When a vessel sinks as the result of an unexplained leak which developed when she was at anchor in calm waters, is the assured in an action on a marine hull policy entitled to a presumption that the leak was the result of an insured peril?

2. May a Court of Appeals consider and decide a case upon issues which were not presented or tried before the District Court?

STATEMENT OF THE CASE

The following recitation of facts is a synopsis of the findings of fact made by the District Court (R. 47).

On August 14, 1953, the Petitioner, Birmingham Fire Insurance Company of Pennsylvania, issued its policy of marine hull insurance covering the M/V "SEA PAK" against

loss from "perils of the sea" and other stated risks, for a period of one year. "SEA PAK" was a wooden hulled vessel and was in good condition at the time of the issuance of the policy. She was then in Miami, Florida, but immediately thereafter she proceeded to Cockburn Harbour, Caicos Islands, B. W. I., where she was based for fishing operations. She was not again hauled out of the water during the year which elapsed between the issuance of the policy and the sinking of the vessel.

On August 9, 1954 the "SEA PAK" was navigated to an anchorage in the lee of Long Key, Caicos Islands, where she remained at anchor until the early morning of August 13th. This anchorage was protected from the prevailing winds and seas and the waters in the anchorage remained calm at all times while the "SEA PAK" was anchored.

At about noon on August 12th her Master noticed that the "SEA PAK" was beginning to take on an unusual amount of water. The leaking became progressively worse and it was determined that it was coming from underneath a refrigerated space in the forward part of the ship. The area of the leak was inaccessible from the interior of the vessel. Shortly before daylight on August 13th the leak had developed to such an extent that it was decided that an attempt should be made to return the vessel to her base at Cockburn Harbour, a distance of some eight miles.

After getting under way the leak continued to get progressively worse and the vessel sank before reaching port. Because of the depth of the water no salvage attempt was made. There was no explanation as to what caused the leak that resulted in the loss of the vessel.

The owners of the "SEA PAK" instituted an action based upon diversity of citizenship, in the United States District Court for the Southern District of Florida, seeking to recover the face amount of the policy of insurance. The case was tried before the District Court, sitting without a jury, and in due course the trial judge entered his findings of fact and conclusions of law (R. 47-51). It was the conclusion of the trial judge that when, as here, a vessel springs a leak in calm waters there is no presumption that her loss was caused by an insured peril. The Court also found that the assured had failed to prove that the vessel was seaworthy immediately prior to the development of the leak. The assured not having shown that the vessel sank as a result of an insured peril, judgment was accordingly entered for the Petitioner.

An appeal was taken by the assured and the judgment of the District Court was reversed by the United States Court of Appeals for the Fifth Circuit (Appendix A & B).

REASONS WHY CERTIORARI SHOULD BE GRANTED

The decision of the United States Court of Appeals for the Fifth Circuit is in conflict with the decisions of other Courts of Appeal on an important question of marine insurance law.

QUESTION 1

When a vessel sinks as the result of an unexplained leak which developed when she was at anchor in calm waters, is the assured in an action on a marine hull policy entitled to a presumption that the leak was the result of an insured peril?

As set forth in the statement above the District Court found — indeed, it was conceded by both parties — that the cause of the leak was unknown. The District Court also found, and it was also conceded by both parties, that it developed while the vessel was lying at anchor in calm waters.

In a suit on a policy of marine insurance, the burden of proving that a loss comes within the terms of the policy rests upon the assured. **Continental Insurance Co. vs. Patton-Tully Transportation Co.,** 212 F. 2d 543, 5th Cir. The Petitioner recognizes, however, that under ordinary circumstances when a vessel **is lost at sea from unknown causes** the Courts permit her owner to indulge in a presumption that the vessel was seaworthy at the time of her loss and that she was lost because of an insured peril. **Paddock v. Franklin Fire Insurance Co.,** 17 Pick (Mass.) 227. However, when a vessel is lost as a result of **springing a leak in calm waters with no explanation,** her owner is not entitled to a presumption that she was lost as a result of an insured peril but, on the other hand, a counter-presumption arises that the sinking was the result of some unseaworthiness of the vessel. Under such circumstances, in order to prevail, the assured must at least show that the vessel was seaworthy immediately prior to the springing of the leak.

In the present case the trial judge of course found that the leak occurred in calm waters, that its cause was unexplained, and that the assured had not proved the seaworthiness of the vessel at the time of the sinking. It was the opinion of the trial judge that under such facts the assured could not prevail. In arriving at this conclusion the District Court followed the great weight of prior authority. In

Boston Ins. Co. v. Dehydrating Process Co., 204 F. 2d 441, the First Circuit, in considering this question, said:

> "It appears to be well settled in Great Britain and also in the United States, indeed the parties agree, that when a vessel sinks at a pier, in calm weather, without any obvious explanation, such as overloading or improper stowage of cargo, or collision, or settling with the tide on a rock or other underwater obstruction, lightning, fire, explosion of cargo or other casualty, **a presumption arises that the incursion of sea water which caused the sinking, and hence the loss, was due to the unseaworthiness of the vessel in some particular."** (Emphasis added.)

In **Klein vs. Globe & Rutgers Fire Ins. Co.,** 2 F. 2d 137, the Third Circuit, in a suit involving a policy of hull insurance, said:

> "The implied warranty of the libelant was that the boat was seaworthy to the extent of being able to withstand all ordinary perils of navigation upon the upper river and the "perils of the seas" against which it was insured were such perils as would be extraordinary to a boat of its type.
> Our immediate duty is to determine whether the record shows that the Tornado's misfortune was occasioned by any such extraordinary peril. In this connection it is to be noted that, even though a vessel is shown to be seaworthy immediately prior to sinking, **no presumption exists that the water entered its hold as a result of a 'sea peril'."** (Emphasis added.)

In **Watson v. Providence Washington Ins. Co.,** 106 F. Supp. 214, E.D.N C., which opinion was approved by the Fourth Circuit, 201 F. 2d 736, the Court said:

> "Even if it be true that the Bertie Kay was seaworthy at the inception of the risk, the plaintiff cannot recover unless the sinking resulted from a peril insured against. If the cause was inherent weakness, or resulted from wear and tear or general unseaworthiness, the loss may not be attributed to a peril insured against. Appelman, Insurance Law and Practice, Vol. 4, Sec. 2689.
> In my opinion, according to the preponderance of authorities, **the insured ordinarily is not entitled to recovery under a marine insurance policy when the insured vessel sinks in calm water in fair weather without explanation."** (Emphasis added.)

These opinions from the First, Third and Fourth Circuits actually have their roots in several much earlier decisions. In 1831 the Supreme Judicial Court of Massachusetts in **Paddock v. Franklin Fire Insurance Co.,** supra, said:

> ". . . if the officers and crew are saved and return to give an account of the actual loss as it occurred, and if it appears from the proof there furnished and the circumstances attending, that the vessel was lost by springing a leak and foundering in moderate weather, **the presumption is that this arises from weakness and material defects; and the burden of proof is upon the plaintiff, to show that it arose from stress of weather, or from collision, or other external injury of an**

extraordinary character, coming under the denomination of perils of the sea." (Emphasis added.)

Again, in 1876, that Court, in **Swift v. Union Mutual Insurance Co.,** 122 Mass. 573, held:

> "If a ship is lost without any apparent sea damage or accident sufficient to destroy a sound vessel, **there is a presumption that it proceeds from inherent weaknesses or decay. For such loss the insuror is not responsible; and the burden of proof is on the plaintiff, as in other cases, to show that the loss arises from a peril insured against . . .**" (Emphasis added.)

Yet in the case at bar the Court of Appeals has ignored all of these prior authorities in granting to the ship owner a presumption that its vessel was lost because of an insured peril, even though she sank as the result of a leak which developed in calm water from unexplained causes. The Court has reached a conclusion which is in direct contradiction to those cited above. The opinions of the other Circuits and of the Massachusetts Court to the effect that such circumstances, in fact, raise a presumption of unseaworthiness has been disregarded without, we might add, a comment upon a single one of these decisions.

The Opinion of the Court of Appeals intimates that this case is somewhat different from those cited above in that the policy not only covers "perils of the sea" but also "latent defect" and "negligence of the Master".* The

* The "Inchmaree" clause to which the opinion of the Court of Appeals refers reads as follows:

"This insurance also specially to cover (subject to the Average Warranty) loss of or damage to the subject matter insured directly caused by the following:—

inclusion in the policy of these coverages, which incidentally were also included in certain of the policies involved in the cases above, does not alter the principal issue presented, namely — What presumptions are raised by the springing of an unexplained leak in calm waters? If the presumption so raised is that the vessel sank as the result of unseaworthiness, as all of the above citations hold, the assured must present proof that his vessel was in fact seaworthy in order to be entitled to recover.

In arriving at a conclusion contrary to those above cited, the opinion of the Court below seized upon a presumption that the vessel was lost from a latent defect, or because of negligence of the Master, completely overlooking the possibility that such loss could well have been caused by deterioration in the hull. Indeed, the vessel's Master expressed just such an opinion (R. 159). There is certainly no more evidence tending to show a loss because of one of the insured perils than there is evidence to show a loss due to natural deterioration.

The plaintiff in **Watson v. Providence Washington Ins. Co.,** supra, made the same argument as has been advanced by the Court of Appeals in the opinion below. There, the policy also contained the so-called "Inchmaree" clause but,

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Accidents in loading, discharging or handling of cargo or in bunkering;
Accidents in going on or off, or while on drydocks, graving docks, ways, gridirons or pontoons;
Explosions on shipboard or elsewhere;
Breakdown of motor generators or other electrical machinery and electrical connections thereto, bursting of boilers, breakage of shafts, or any latent defect in the machinery or hull, (excluding the cost and expense of replacing or repairing the defective part);
Contact with Aircraft or with any land conveyance;
Negligence of Master, Charterers other than an Assured, Mariners, Engineers or Pilots;
Provided such loss or damage has not resulted from want of due diligence by the Assured, the Owners or Managers of the Vessel, or any of them. Masters, Mates, Engineers, Pilots or Crew not to be considered as part owners within the meaning of this clause should they hold shares in the Vessel."

as that opinion points out, the burden is still upon the assured under the circumstances presented to prove the existence of such a latent defect. Specifically, the Court there said:

> "Plaintiff contends that even if it be held that proof has not been offered to show loss from a peril of the sea, plaintiff should recover under the provision of the policy covering loss from a latent defect in the machinery or hull. It seems, though, to me, that there is the same weakness in this position as in the other one, namely, there is no proof that any latent defect in the machinery or hull caused the vessel to sink."

We therefore see that the decision of the Court of Appeals in the case at bar is in direct conflict with the views expressed in the **Watson** case, and approved by the Fourth Circuit.

Neither does the fact that the policy of insurance here being considered contained an "Inchmaree" clause distinguish the present proceedings from **Boston Ins. Co. v. Dehydrating Process Co.,** supra. The same clause was contained in that policy.* Yet that did not prevent the Court from there holding that the incursion of sea water under such circumstances raised a presumption that the vessel sank because of her unseaworthiness. In fact, as the opinion of the First Circuit states, counsel for the parties and the Court agreed that such was the law. There was not even an intimation that the mere fact that certain additional risks were added to the policy under the "Inchmaree" clause

* While this fact does not appear in the opinion of the First Circuit, an examination of the record in that case reveals it to be so.

would serve to negate the long-recognized principle that a sinking under such circumstances raises a presumption of the vessel's unseaworthiness. Again, it is abundantly clear that the opinion of the Court of Appeals in the case at bar is in direct conflict with that expressed by the First Circuit in the **Boston Ins. Co.** case.

QUESTION 2

May a Court of Appeals consider and decide a case upon issues which are not presented or tried before the District Court?

At the outset of the discussion of this point we feel that, in fairness to Respondent's counsel, we should inform this Court that the action of the Court of Appeals in considering points not raised in the pleadings or tried in the District Court is not the result of any urging by Respondent's counsel. Rather, the Court of Appeals, apparently of its own volition, saw fit to discuss and decide points which were wholly foreign to the matters presented before the District Court. An Appellate Court can no more take it upon itself to raise new issues on appeal than can a party to the cause.

In reversing the District Court, the Court of Appeals apparently concluded that it would grant to the assured a presumption that the vessel had been lost as a result of some peril insured under the "Inchmaree" clause. Yet in the trial before the District Court it was the contention of the assured that the facts presented raised a presumption that the vessel had sunk due to a "peril of the sea". The

position of the assured is clearly stated in its proposed conclusion of law Number 2, (R. 287) submitted to the trial judge.*

There was never any contention made by the assured that it claimed that the loss was caused by anything other than a peril of the sea. It is true that in its complaint the assured alleged that the loss was the result of "perils of the seas, latent defects in the machinery, and/or other perils insured against." (R-2). However, in answer to interrogatories propounded by the Petitioner (R-13) for the purpose of ascertaining the specific perils which the assured contended caused the loss, the assured merely answered that the vessel sprung a butt on its bottom under the freezer box. In these answers the assured specifically disclaimed any latent defect in machinery, and negligence of the Master was not even mentioned. (R-21).

The "Inchmaree" clause, which first raised its head in the opinion of the Court of Appeals, is nothing more than a clause adding certain enumerated risks to the policy. If the assured expects to recover for a loss because of some coverage therein contained, he certainly must contend that the loss was occasioned by such a peril when the proceedings are pending in the District Court. In the case at bar there were no such contention. Neither was there any evidence offered in an attempt to show a loss because of some "Inchmaree" peril. Indeed, the only evidence as to

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* This proposed conclusion reads:

"As the vessel was shown to be seaworthy at the inception of the risk, a presumption has been raised that the loss was by perils of the sea and the assured need not offer positive proof of the cause of the loss. If Underwriters would rebut that presumption, they must not only prove that the vessel was unseaworthy but that the unseaworthiness 'resulted from want of due diligence by the Assured, the Owners or Managers of the Vessel, or any of them. Masters, Mates, Engineers, Pilots or Crew not to be considered as part owners within the meaning of this clause should they hold shares in the vessel'."

the cause of the leak was the testimony of the vessel's Master to the effect that the leak was characteristic of a rotten wood condition (R. 159).

The entire case was tried before the District Court by both parties upon the issue as to whether or not the Court could presume that the loss was the result of a peril of the sea. Yet the Court of Appeals holds that the "Inchmaree" clause is determinative in this case. The effect of such a ruling by an Appellate Court when no claim that the loss was caused by such perils was made in the District Court is to saddle the Petitioner with a conclusive presumption against it that the loss was caused by such a peril. Of course the Petitioner had no opportunity in the Court of Appeals to offer evidence to rebut such a presumption, if in fact there be one. How can a party be expected to offer evidence on a point that has never been put in issue before the trial court? And how can a trial judge be expected to rule that a loss is presumed to be the result of a specified peril when the plaintiff has never contended that such a peril caused the loss? As has been aptly stated, the function of an Appellate Court is, in effect, to try the trial judge -- not to try the case **de novo.**

Consider the difference between the opinion of the Court of Appeals in the present case, wherein it voluntarily introduces new grounds upon which to base its reversal, and the opinion of the Second Circuit in **G. W. Sheldon & Co. v. Hamburg-America, P.A.G.,** 287 2d 249, wherein it said:

> "The learned trial judge could not be expected to find that the Respondent had committed a deviation in the carriage of the merchandise when no

such request was made and no allegation, pleading or evidence offered to support it. This alleged error may not be considered here and made a ground for reversal."

This Court and the various Court of Appeals have repeatedly held that issues not presented before the trial court cannot be raised on appeal. The following cases are indicative of the many decided on this point:

Virtue vs. Creamery Package Mfg. Co., 227 U. S. 8, 57 L. Ed. 393, 33 S. Ct. 202

United States v. New York Telephone Co., 326 U. S. 638, 90 L. Ed. 371, 66 S. Ct. 393.

Walters v. City of St. Louis, 347 U. S. 231, 98 L. Ed. 660, 74 S. Ct. 505

Even a recent opinion of the Fifth Circuit is to the same effect. **U. S. v. Synor,** 238 F. 2d 271.

CONCLUSION

The ruling of the Court of Appeals in the case at bar is in direct conflict with the Courts in the other Circuits as to the presumption which arises when a vessel springs a leak in calm waters. In reaching its conclusion, the Court of Appeals considered and relied upon issues not presented or tried before the District Court. For these reasons we respectfully urge that a Writ of Certiorari be granted in this cause.

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APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 16071

TROPICAL MARINE PRODUCTS, INC.,
Appellant,

versus

BIRMINGHAM FIRE INSURANCE COMPANY OF PENNSYLVANIA,
Appellee.

Appeal from the United States District Court for the Southern District of Florida.
(August 13, 1957.)

Before TUTTLE, JONES and BROWN, Circuit Judges.

BROWN, Circuit Judge: This appeal by the shipowner tests the correctness of the adverse judgment of the District Court after a trial without a jury denying recovery under an American Institute Time Hull Policy for a sinking from unknown causes. So uncontradicted are the facts, as found or as controlling, that the District Judge's findings of fact were an almost verbatim adoption of those proposed by the plaintiff Shipowner, the losing party. The case turned finally in the Judge's analysis upon successive presumptions.

Except for a few editorial changes involving no matter of substance, ours is a direct recital, with an occasional paraphrase, of the Judge's findings.

The policy was for the period August 14, 1953 to August 14, 1954. The vessel was valued at $30,000. The **Sea Pak** was a wooden hull vessel originally built for the United States Coast Guard. She was 71'7" long, 13'6" wide and drew 4'6" of water. In the summer of 1953, she had been overhauled[1] in Miami and in August 1953 was in good condition and seaworthy. She left Miami in August 1953 and was operated from that time until her loss in and around Caicos Islands in the Bahamas. She had not been hauled out of the water subsequent to August 1953, although she had been placed in shallow water and her bottom scrubbed on several occasions while she remained afloat.

The **Sea Pak** left Cockburn Harbour, South Caicos Islands, on August 9, 1954. It proceeded to a fishing anchorage in the lee of Long Key.[2] This was a distance of about eight miles. The fishing anchorage was protected from the prevailing winds and from the sea and the water, and the anchorage remained calm all the time the **Sea Pak** was anchored there. The vessel remained at anchor in about 15

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1 She was rebuilt in Miami under the immediate supervision of the underwriter's surveyor who unqualifiedly recommended her for insurance for the annual term and without any recommendations or requirements for drydocking, bottom inspection, repainting or the like. The surveyor testified:

"The hull was checked. A lot of new planks were put in the ship. The caulking was recaulked. * * * Her stuffing boxes were checked and repacked. The vessel was completely overhauled to my satisfaction."

Her intended trade was known and the policy expressly stated:

"NAVIGATION LIMITS: Warrented confined to inland and coastal waters of the Bahamas, with occasional trips to the Florida East Coast for repairs."

feet of water in this protected area until approximately 5:00 a.m. on August 13. During this time the vessel was collecting conch from small skiffs that were fishing in that area.

At about noon on August 12, the Master noticed that the **Sea Pak** was beginning to take on an unusual amount of water and that the automatic pump was working more than normally necessary. During that afternoon and night the leaking became progressively worse. An inspection of the vessel revealed that the water was coming from underneath a refrigerated space in the forward part of the ship. Because of the construction of the interior of the vessel, the bilge underneath this area was inaccessible. Shortly before daylight on August 13, the Master felt that the leak had developed to such an extent that he should attempt to return to Cockburn Harbour.

As soon as it way daylight, or about 5:00 a.m., on Friday the 13th, the anchor was raised and the boat proceeded around the south end of Long Key into the open waters of Turks Island Passage in an effort to return to Cockburn Harbour. At this time, the sea on the wind-ward side of Long Key was choppy and there was a moderate breeze. These conditions were not unusual for that area and were not such as would ordinarily have caused the vessel any difficulty.

After the vessel got underway, the leak continued to get progressively worse and before the ship could reach

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2 Because of intervening sand and coral shoals between the fishing ground and Cockburn Harbour, the vessel had to go outside into the Atlantic Ocean and coast well off the seaward side of Long Key, a coral key about five miles long rising precipitously from the water to a height of fifty feet or so and exposed to seas which occasionally broke over the top of these high rocky cliffs.

Cockburn Harbour, the leak had progressed to such an extent that the vessel's engine was drowned out. The vessel then drifted back along the shoreline of Long Key until the Master ordered the crew to abandon her. The four men on board then rowed ashore in a 14' rowboat which was being towed astern of the **Sea Pak** and the **Sea Pak** eventually sank outside the 100 fathom curve. Because of the depth of the water, no salvage attempt was made.

The Court concluded, as both plaintiff and defendant urged and as the physical loss which destroyed all evidence required, that "there is no explanation as to what caused the leak which resulted in the loss of the vessel."

Proceeding apparently then from an implied application which was not spelled out of a presumption[3] of unseaworthiness because the vessel developed a leak in these calm waters in the lee of Long Key, the Court held as a legal conclusion that in the face of this presumption, there was not a counter presumption[4] that the loss came within the perils covered by the policy. The Shipowner contended that even though the **sinking** of the vessel in calm protected waters might give rise to an inference of unseaworthiness, proof of seaworthiness, here admitted, as of the inception of the risk, was sufficient upon which the usual presumption[5] would operate that, in the absence of a showing that it occurred from an excepted peril, the loss was caused by a peril insured against.

The Underwriter argues that, accepting these cases urged by the Shipowner, the counter presumption that the

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3 Paddock v. Franklin Fire Ins. Co., 17 Pick. (Mass.) 227; Swift v. Union Mutual Ins. Co., 122 Mass. 573; Watson v. Providence Washington Ins. Co., D.C.N.C. 106 F. Supp 244, 1952 AMC 1812 appeal dismissed, 4 Cir., 201 F. 2d 736, 1953 AMC 337.

loss was from an insured peril, does not arise unless the owner proves that immediately before the loss the vessel was in a seaworthy condition. On this it emphasizes that the Court held as a fact that the Shipowner had not shown that the vessel was seaworthy immediately prior to the developing of the leak.

But we think that the difficulty with this decision stems from the fact that, like the underwriter, the Court assumed that the policy only insured "* * * the vessel against loss from extraordinary occurrences and does not insure her against those ordinary perils which vessels must encounter * * *." In the quaint language which persists in this ancient policy form, the **Portmar, Calmar Steamship Corp. v. Scott,** 345 U. S. 427, 97 L. Ed. 1125, 1953 AMC 952, with its "Pirates, Rovers, Assailing Thieves * * * and Detainments of * * * Princes * * *," the Court's opinion makes it plain that all he thought involved was the initial insuring clause which he quoted:

> "Touching the Adventures and Perils which we, the said Underwriters, are contented to bear and take upon us, they are of the Seas, Men-of-War, Fire, Lightning, Earthquake, Enemies, Pirates, Rovers, Assailing Thieves, Jettisons, Letters of Mart and Counter-Mart, Surprisals, Takings at Sea,

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4 The Court cited: Watson v. Providence Washington Ins. Co., 106 F. Supp. 244 (opinion approved 201 F. 2d 736); Klein v. Globe & Rutgers Fire Ins. Co., 2 F. 2d 137; Jahn v. Steamship Folmina, 212 U. S. 264; Long Dock Mills & Elevator Co. v. Manheim Ins. Co., 116 Fed. 886; Swift v. Union Mutual Insurance Co., 122 Mass. 573.

5 The Shipowner relies principally upon: Mattson v. Connecticut Fire Ins. Co. of Hartford, D.C. Minn., 80 F. Supp. 101; Boston Insurance Company v. Dehydrating Process Co., 1 Cir., 204 F 2d 441, 1953 AMC 1364; Land v. Franklin National Ins. Co. (So. Car.), 225 S. C. 33, 80 S. E. 2d 420; Glens Falls Ins. Co. v. Long, 195 Va. 177, 77 S. E. 2d 457, 1953 AMC 1841.

> Arrests, Restraints and Detainments of all Kings, Princes and Peoples, of what nation, condition or quality soever, Barratry of the Master and Mariners and of all other like Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the said Vessel & c. or any part thereof."

This was to overlook a substantial insurance undertaking which, history shows, **The Spot Pack, Saskatchewan Government Insurance Office v. Spot Pack, Inc.,** 5 Cir., 242 F. 2d 385, 1957 AMC 655; **Ferrante v. Detroit Fire and Marine Insurance Company,** D. C. Calif., 125 F. Supp. 621, 1954 AMC 2026, was added voluntarily by underwriters, (with successive amendments to meet like conditions) to expand protection to shipowners and thereby overcome court decisions favorable to an underwriter but which, the underwriting fraternity thought unrealistic and a denial of coverage reasonably needed. Personified by the name of the vessel giving rise to the decision, The Inchmaree clause, with almost ritualistic uniformity provides generally, and here, specifically:

> "This insurance also specially to cover * * * loss of or damage * * * directly caused by the following:—
>
> * * *
>
> "Breakdown of motor generators or other electrical machinery and electrical connections thereto, bursting of boilers, breakage of shafts, or any

latent defect in the machinery or hull, (excluding the cost and expense of replacing or repairing the defective part);

* * *

"Negligence of Master, Charterers other than an Assured, Mariners, Engineers or Pilots;

"Provided such loss or damage has not resulted from want of due diligence by the Assured, the owners or Managers of the Vessel, or any of them. * * *"

This affords both an additional series of perils insured against and markedly affects the warranties of seaworthiness between Shipowner and Underwriter.

The Court here apparently labored, as did so many so long under some sort of notion that the owner owed the duty to keep and maintain the vessel in seaworthy condition and consequently, to recover, the owner must establish this as a fact. Indeed, the point of departure[6] between the plaintiff's proposed and the Court's findings adopted was over the seaworthiness[7] of the vessel immediately prior to the loss.

But as we, The **Spot Pack, Saskatchewan Government Insurance Office v. Spot Pack, Inc., supra,** and the Second

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6 On the specific issue of the *cause* of the loss, there is no real difference. The court found:

"7. There is no explanation as to what caused the leak which resulted in the loss of the vessel."

Whereas the plaintiff Shipowner proposed this finding:

"10. The precise cause and nature of the leak remained unknown."

Circuit, **New York, New Haven and Hartford R. Co. v. Gray,** 2 Cir., 240 F. 2d 460, 1957 AMC 616, cert. den. . . . . U. S. . . . ., 1 L. Ed. 2d 915, by almost simultaneous decisions have recently pointed out, the owner's obligation under a Time Policy, as was this one, is extremely limited: the vessel is seaworthy at the attachment of the insurance, but henceforth it is a sort of negative warranty, i.e., the owner or those in privity with him will not knowingly send the vessel to sea in a deficient condition.

Here the most that was determined as to unseaworthiness of the MV **Sea Pak** was the Court's negative finding that the owner had not sustained its burden of proving seaworthiness. This is far from the opposite holding that the vessel was **un**seaworthy. On that the Court did not make such a finding and perhaps for the reason that, on the record before him, it was doubtful that there was sufficient proof.[8] There was evidence that two fishermen

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[7] The Court found:
"8. The Plaintiff has not shown that the vessel was seaworthy immediately prior to the developing of the leak which resulted in the loss of the vessel."
The plaintiff Shipowner proposed the exact opposite:
"11. Defendants have not shown that the vessel was unseaworthy immediately prior to her last voyage nor has there been any showing of want of due diligence on the part of the assured and owners of the Sea Pak to make her so."

[8] To be sure the Underwriter offered as impeachment the statements of two native crewmembers, a 17-year-old Engineer and the Cook who could "write but not read" and who claimed he was intoxicated as well. These statements were given after each was escorted by a local policeman and taken before the British Commissioner of South Caicos as he sat on his dais flanked by the Underwriter's American lawyer and an investigator surveyor. These statements, sharply contradicting their deposition evidence that the vessel had had no appreciable leaks, stated that the *Sea Pak* during the six weeks prior to her sinking had leaked extensively. The Underwriter's brief asserts "the trial judge was certainly free to give the statement such weight as he saw fit." Of course, that is true as to destroying the credibility of these witnesses to prove seaworthiness. But the prior inconsistent statements were the only word testimony of unusual abnormal leaks, and they were not admissible to prove that *fact*. 58 Am. Jur., Witnesses, §770.

skindivers (not ship repairmen) made an underwater inspection a month or so before and drove in a few wooden plugs, but whether in blanked off auxiliary openings or elsewhere was extremely vague. One diver, who asserted that the bottom "was all right," also said that "there was no paint on it, no paint that you would call paint." But except for the prior inconsistent statements of the two crew members, note 8, **supra,** the evidence was uncontradicted from the current master and his immediate predecessor (who had left the vessel two weeks before her sinking for a vacation) that there were only the usual leaks one expects in a wooden hull vessel. The equivocal[9] evidence of the underwater activity of the skindivers was a circumstance which, with other evidence, could be used in drawing the competing inferences that, on the one hand, this showed careful, prudent diligence in the maintenance of the vessel or, on the other hand, the existence of an unseaworthy condition. But standing alone, it was insufficient to prove unseaworthiness and the remainder of the record would not overcome this deficiency.

The only thing of substance, pressed so hard and successfully by the Underwriter on the Court, was a presumption, note 3, **supra,** not evidence, that when a vessel **sinks** in a calm protected harbour the cause, unless otherwise satisfactorily explained, must have been unseaworthiness.

But even though it is assumed that this rule would apply when the leak develops while the vessel is at sea

[9] The Underwriter's surveyor as an expert testified:
"The Court: The question is whether an adequate inspection could be made by divers while the ship is in the water?
"The Witness: In my opinion, no, sir."

and after it has left port, the Court attributed unwarranted consequences to it. On the findings, the leak developed **after** the vessel had been out three and one-half days. If it is assumed **arguendo** that when the **Sea Pak** left Cockburn Harbour on August 9, she was in an unseaworthy condition, there is absolutely none that the Shipowner or anyone in privity with it know of that. There was thus no breach of the limited warranty of seaworthiness nor of the insurance and it was effective. **The Spot Pack, Saskatchewan Government Insurance Office v. Spot Pack, Inc., supra.** When as the Court found, the unseaworthy condition (leak) developed, after the vessel was at sea and there were then no means by which to remedy it, what happens to the insurance? Does it terminate at the very moment it is needed most? Cf. **Henjes v. Aetna Insurance Company,** 2 Cir., 132 F. 2d 715, 143 AMC 27, cert. den. 319 U. S. 76, 87 L. Ed. 1711.

Indeed, far from voiding the policy, it was as to just such unseaworthiness that the policy was meant to apply. The Inchmaree clause insures against damage or loss occasioned by latent **defects** in machinery or hull. Of course, a defect in machinery or a defect in a hull means that the vessel is thereby unseaworthy since, with such defect, the machinery or hull, cannot comply with the classic definition of "reasonably suitable" for the purposes intended. The Silvia, 171 U. S. 462, 43 L. Ed.. 241; **Compania de Navegacion v. Fireman's Fund Insurance Co.,** 277 U. S. 66, 72 L. Ed. 787. The only limitation on this is that the defect be latent and one not known or discoverable by the owner or one in privy with him. This is so because, as we held in **Spot Pack Saskatchewan Government Insurance Office v.**

Spot Pack, Inc., supra, the phrase "Provided such loss or damage has not resulted from want of due diligence by the Assured, the Owners, or Managers of the Vessel" does not include acts of the master or crew members merely imputed on notions of **respondeat superior.**

Here, of course, the owner was in the United States and on this record all was left to the master. There is no evidence that the nonresident owner had personal knowledge of this condition, whatever existed, or the necessity for any detailed drydocking, bottom inspection, scraping or repainting. The policy, as is so often the case, did not prescribe any requirement for drydocking or a routine period for drydocking. That there might have been testimony that the bottom paint was gone, and one surveyor faintly suggested that he thought the vessel should have been hauled out every six months or so to avoid action by wood-destroying worms (an opinion expressed without knowledge of the practice following in the Caicos Islands where the evidence indicated an absence of such wood borers) was not of that caliber essential to a holding that the Shipowner personally failed to take prudent steps.

The defect was certainly latent in a practical sense. The Court found that there is "no explanation as to what caused the leak." And all are unanimous that it was and could not be determined. As the leak was increasing, the master and engineer determined that it had to be coming from that part of the hull in way of the freezer compartment. There was positively no means of checking the inside of the hull in this space and, of course, lying at

anchor eight miles from port, there were no facilities established for a worthwhile inspection or repair over the side.

Since cases should be decided on practicalities and not theoreticals, the fact that this record stands uncontradicted that the hull did not leak in this way, at this place, or in this quantity prior to departure from port August 9, or on any one of the intervening days up to the afternoon of August 12, demonstrates also that if, as some theorize, a butt (the joinder of the ends of two of the hull planks) sprung to permit the leak, there is no[10] basis for concluding that the defect could then have been discovered.

And if the matter is approached from the viewpoint that the Shipowner, without the benefit of any presumptions, must affirmatively establish that the particular defect was latent within the classic[11] meaning of the term, the

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10 The Underwriter's expert testified:

"Q. What would cause a butt to spring?

"A. A poor fastening.

"Q. What?

"A. A poor fastening, or the wood is soft around the fastening."

He did not, of course, undertake to say that such poor fastening would have been discoverable. In any event, his testimony was uncontradicted that at least one plausible cause might not show up (be discoverable) for some time:

"Q. She might have strained a butt in the seaway at some previous date, which showed up later?

"A. That could happen."

11 "A latent defect is one that could not be discovered by any known and customary test." The West Kyska, Waterman S.S. Corp. v. United States Smelting Refining & Mining Co., 5 Cir., 155 F. 2d 687 at 691, 1946 AMC 997 at 1003, cert. den. 329 U. S. 761, 91 L. Ed. 656, and "* * * is a hidden defect and generally involves the material out of which the thing is constructed as distinguished from the results of wear and tear." Ferrante v. Detroit Fire and Marine Insurance Co., D. C. Calif., 125 F. Supp. 621 at 624, 1954 AMC 2026 at 2030. It is "A hidden defect * * * not manifest, but hidden or concealed, and not visible or apparent; a defect hidden from knowledge as well as from sight; * * * a defect which reasonably careful inspection will not reveal; one which could not have been discovered by inspection * * * by any known and customary test." 26A CJS, Defect., p. 133. Mellon v. Federal Ins. Co., D. C. N. Y., 14 F 2d 997; The Bill, C C. Md., 47 F. Supp 969, 1942 AMC 1607, affirmed Lorentzen v. Brazil Oiticica, Inc., 4 Cir. 145 F. 2d 470, 1945 AMC 108.

result is the same. Since the Underwriter's assertion of unseaworthiness is a claim that the hull was defective, it was either latent or not latent. If it was not discoverable prior to departure for sea by all known and customary tests, it was latent and covered under the policy. If, on the other hand, it is claimed that the proof showed that it was discoverable by prudent inspections, or that the proof failed to show that prudent inspection could not have revealed it, the result is that the defect was one which in prudence ought to have been discovered. On this hypothesis, it was the Master who should have discovered it. If the Master knew of the leak or the conditions likely to give rise to leaks, or if the Master, not knowing that, knew enough that he ought to have discovered this condition, it was his clear duty to his Shipowner to do all that prudence required to ascertain and correct such conditions. The record is uncontradicted that the Master was responsible for the current upkeep, maintenance and repair of the vessel while she was in the Islands, and the Shipowner had approved all of his maintenance requirements. The Master's failure in carrying out his duty to his Shipowner was negligence and, under the Inchmaree clause, this too was specifically covered.

If the defect could have been discovered the resulting unseaworthiness was due to the Master's negligence; if it was not discoverable by him or Shipowner, it was latent. Either way the Underwriter turns, the loss is within his expanded coverage.

To be remembered also is the fact that this vessel did not sink in a calm sea or in the harbour-like protection of the lee of Long Key. A leak developed there, and the leak

became increasingly worse. But the sinking of the ship was the direct action of substantial seas with wind abeam, while running off the exposed percipitous coast of Long Key in the effort to make the port of haven. It was undisputed that with the butt sprung, the action of the vessel being pushed ahead by her own power, working against the seas, would open up the planks even further. While it is true that these seas were not tempestuous, it is just as true that it was the cruel sea working on a troubled hull which changed a possible sinking in fifteen feet of water at the fishing anchorage into an inevitable total loss as she sunk to the watery grave outside the 100 fathom curve.

When the leak was discovered the vessel, as we said above, still had insurance. Likewise, there was no duty owed the Underwriter not to attempt to make a port of haven. Negligence of the assured or his agent is no defense to a marine policy, **New York, New Haven and Hartford R. Co. v. Gray, supra,** at 464; **Orient Mutual Insurance Co. v. Adams,** 123 U. S. 67, 31 L. Ed. 63; **Columbia Insurance Company of Alexandria v. Lawrence,** 35 U. S. 507, 9 L. Ed. 512; **Waters v. Merchants Louisville Insurance Company,** 11 Pet. 213, 36 U. S. 213, 9 L. Ed. 691; **Patapsco Insurance Co. v. Coulter,** 3 Pet. 222, 28 U. S. 222, 7 L. Ed. 659. And if it is assumed that to attempt the voyage in the exposed sea with the vessel in this weakened condition was a negligent act, it inevitably was negligence of the master then in sole command who alone determined whether to attempt the perilous run for sanctuary rather than risk sinking in fifteen feet of water, or pressing her bow onto the sand shoals. But there again, the more palpable was the master's negligent choice of these alterna-

tives, the more categorical it makes the Inchmaree liability for "negligence of master."

We cannot emphasize too strongly that, as was the purpose of the underwriters in making the change, the Inchmaree clause is an expansion of coverage of considerable magnitude. Unlike so many cases, **Union Insurance Company of Philadelphia v. Smith,** 124 U. S. 405, 31 L. Ed. 497; **Continental Insurance Company of City of New York v. Patton-Tully Transportation Company,** 5 Cir., 212 F. 2d 543, 1954 AMC 889; **Ideal Cement Co. v. Home Insurance Company,** 5 Cir., 210 F. 2d 937, 1954 AMC 663; **Hanover Fire Insurance Co. v. Holcombe,** 5 Cir. 223 F. 2d 844, 1955 AMC 1531, cert. den. 350 U. S. 895, 100 L. Ed. 787, where each policy contained an express warranty of continuing seaworthiness and an exclusion of losses caused by unseaworthiness, a Time Hull Policy with no warranty of continuing seaworthiness but with an Inchmaree clause does in fact underwrite unseaworthiness of many types.

If a vessel has become unseaworthy due to the negligence of master or engineer in the maintenance of the vessel, in putting to sea without adequate equipment, fuel or stores, or without making required repairs at outports wheer the master is the sole principal representative of the owners, the "cause" is negligence and this is expressly underwritten. If there is an undiscoverable defect in hull or machinery, the resulting unseaworthiness or the damage caused by it[12] is nonetheless covered.

[12] Add to this the endless possibilities for other specific Inchmaree coverages not quoted in the excerpt above: "Accidents in loading, discharging or handling cargo, or in bunkering," e.g., damage to hull from use of unseaworthy winch, booms or cargo gear; damage to vessel during loading or discharging operations resulting from the unseaworthiness brought about by such opera-

Consequently, this is not the simple case in which a loss due to unseaworthiness affords a double-barreled reason for nonpayment—a defense based upon the breach of the warranty, express or implied, or as automatic proof that the loss arose from this rather than a specified peril (perils of the sea) insured against. For if the vessel really sank because the hull was unseaworthy, or by reason of the action of the sea on that unseaworthy hull, as distinguished from the action of the sea alone, this no longer automatically denies recovery. Recovery is denied now only if that unseaworthiness is one not caused or brought about by the various elements of the Inchmaree clause.

The judgment denying recovery is therefore reversed and here rendered for the plaintiff Shipowner.

REVERSED AND RENDERED.

tions, e.g., listing, faulty trim, overloading. "Explosions on shipboard or elsewhere," e.g., from accumulations of gases from unseaworthy valves or tanks, malfunctioning of pressure relief valves on air tanks, manifold headers, etc. "Breakdown of motor generators or other electrical machinery and electrical connections thereto," e.g., collision damage from failure of unseaworthy electrical steering engine.

APPENDIX "B"

JUDGMENT.

Extract from the Minutes of August 13, 1957.

TROPICAL MARINE PRODUCTS, INC.

No. 16071

versus

BIRMINGHAM FIRE INSURANCE COMPANY OF PENNSYLVANIA.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court denying recovery in this cause be, and the same is hereby, reversed and here rendered for the plaintiff, Tropical Marine Products, Inc.;

It is further ordered and adjudged that the appellee, Birmingham Fire Insurance Company of Pennsylvania, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

APPENDIX C

ORDER OF THE COURT OF APPEALS

DENYING REHEARING

Extract from the Minutes of September 11, 1957.

TROPICAL MARINE PRODUCTS, INC.

No. 16071 versus

BIRMINGHAM FIRE INSURANCE COMPANY
OF PENNSYLVANIA.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.